

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DAVID E. TRIMBLE</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>GOODYEAR TIRE &amp; RUBBER CO.</b>	)	
Respondent	)	Docket No. 1,028,052
	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the February 22, 2007, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

The Administrative Law Judge (ALJ) ordered respondent to pay temporary total disability benefits to claimant at the rate of \$467 per week beginning January 3, 2007, until claimant is certified as having reached maximum medical improvement or is released to substantial and gainful employment. The ALJ, however, denied claimant's request for medical treatment, specifically gastric bypass surgery.

Claimant appeals the ALJ's denial of authorization for gastric bypass surgery. Claimant argues that the evidence was uncontradicted that the recommended medical treatment of a gastric bypass surgery procedure is reasonable and necessary to alleviate claimant's symptoms from his work injury and presents the most reasonable opportunity for claimant to return to work. The ALJ did not rule that the uncontradicted evidence was inherently improbable or unreasonable and, therefore, the ALJ should have been bound by that evidence. Accordingly, claimant requests that the Board reverse the ALJ's denial of authorization for gastric bypass surgery.

Respondent and its insurance carrier (respondent) request that the Board affirm the finding of the ALJ denying authorization for gastric bypass surgery because it is not treatment of a work-related condition. Respondent also requests that the Board reverse

the ALJ's Order granting claimant temporary total disability benefits, specifically arguing that respondent offered claimant an accommodated position, and claimant declined it. In addition, respondent contends that claimant's refusal to participate in work hardening constitutes an unreasonable refusal to submit to medical treatment and, therefore, all benefits, including medical and temporary total compensation, should be denied.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a tire trimmer. He was required to stand in front of a spinning tire in a hunched-over position. He had a knife in each hand that he used simultaneously to trim a tire. Claimant worked the 11 p.m. to 7 a.m. shift. He said he was not having any back pain when he reported to work on February 22, 2006, at 11 p.m. However, at about 6 to 6:15 a.m. the morning of February 23, 2006, he felt a sharp, stabbing pain in his mid and low back. Dr. Karen Bruce was named as claimant's authorized treating physician. Dr. Bruce referred claimant to Dr. Kenneth Gimple for a consultation. Dr. Gimple diagnosed claimant with degenerative disc disease of the lumbar spine with no nerve root impingement. He advised claimant that he was not a candidate for surgery and recommended that he return to light work activity with a restriction against lifting more than 20 pounds.

Dr. Bruce then referred claimant to Dr. Glenn Amundson. Dr. Amundson also found that claimant suffers from multilevel degenerative disc disease. He stated, however, that claimant is not a candidate for surgery due to his morbid obesity. Dr. Amundson recommended that claimant undergo gastric bypass to aid in his various health problems, including reducing his back pain. Dr. Bruce acquiesced in this opinion. Claimant's request for authorization of gastric bypass surgery was denied by the ALJ.

Respondent disputes that gastric bypass surgery is medically necessary and is a direct result of his work-related back injury. Whether claimant's need for gastric bypass surgery is directly attributable to his work-related accident is an issue the Board may review on an appeal from a preliminary hearing order because it gives rise to the jurisdictional issue of whether the medical treatment is needed for an injury that arose out of and in the course of his employment.<sup>1</sup>

If in any employment to which the workers compensation act applies,  
personal injury by accident arising out of and in the course of employment is caused

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<sup>1</sup>See K.S.A. 44-534a(a)(2) and K.S.A. 2005 Supp. 44-551(b)(2)(A).

to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>2</sup>

Respondent questions whether claimant's need for a gastric bypass is directly attributable to the compensable injuries he suffered in connection with this claim. K.S.A. 44-510h(a), requires that employers provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury."

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.<sup>3</sup>

Obviously, the context in which the services are provided is significant to any determination of what constitutes medical treatment. The Kansas Court of Appeals has held that what may not constitute medical treatment in one context, may in another. In *Hedrick v. U.S.D. No. 259*,<sup>4</sup> the Court of Appeals held that a personal motor vehicle was not medical treatment in the context of that claim, but expressly noted that if claimant's injury had resulted in paraplegia its holding might have been different.

Claimant has diabetes and is overweight. He had diabetes and was overweight before his accident at work. The gastric bypass surgery will benefit his diabetes and weight problem. However, it will also benefit his work-related back injury. It appears that Dr. Amundson's primary reason for recommending the surgery is to treat claimant's back pain.

[Claimant] has requested that I inform you of my recommendation that patient undergo gastric bypass. I do feel this would aid in his overall health and comorbidity of diabetes and hypertension as well as reducing his back pain. I did see [claimant] for a second opinion consultation on 09/08/06. He suffers from multilevel degenerative disc disease manifesting his predominant 100% low back pain presently. In his present state of morbid obesity he is not a surgical candidate

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<sup>2</sup> K.S.A. 2005 Supp. 44-501(a).

<sup>3</sup> K.S.A. 44-510h(a).

<sup>4</sup> *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997).

at this time. If he were to undergo gastric bypass and reduce his overall weight, there is a very good chance his low back pain would lessen as well.<sup>5</sup>

Dr. Bruce opined:

I am in receipt of a letter from Glenn Amundson, MD to whom I referred [claimant] for his back injury. Dr. [Amundson] states that [claimant] would benefit from gastric bypass surgery in management for his back pain. As this is the most likely reason [claimant] will have maintaining function in his job, I believe this is a good option for [claimant] as well.<sup>6</sup>

The undersigned Board Member finds that the gastric bypass surgery is reasonable and necessary medical treatment to cure or relieve the effects of claimant's work injury.

Turning now to the issue of temporary total disability, upon its receipt of Dr. Gimple's report releasing claimant to work with restrictions, respondent offered accommodated work, which claimant declined, and work hardening, which claimant started but failed to conclude. Claimant testified that the work hardening program was causing him pain, and he wanted to check with Dr. Amundson about the weight restrictions and activities at work hardening, so he stopped going to work hardening for a period of time. He returned to work hardening but missed some time while he went hunting. When he returned to work hardening again, he was told that the doctor's order for work hardening had expired. Claimant also testified that he had been offered work from respondent within his restrictions, but that was during a strike, and he was unwilling to cross the picket lines. When he attempted to return to work within his restrictions after the conclusion of the strike, he was told that respondent was not allowing any employee under work restrictions to return to the plant.

Respondent has asked the Board to reverse the ALJ's Order granting claimant temporary total disability benefits. The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.<sup>7</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses

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<sup>5</sup> P.H. Trans. (Feb. 21, 2007), Cl. Ex. 2 at 5.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> K.S.A. 2005 Supp. 44-551.

apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>8</sup>

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>9</sup>

An ALJ has the jurisdiction and authority to decide whether and for how long to grant temporary total disability benefits at a preliminary hearing. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.<sup>10</sup> Accordingly, respondent's appeal of the issue of payment of temporary total disability compensation is dismissed.

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

The issue of whether claimant unreasonably refused medical treatment and should, therefore, be denied all benefits pursuant to K.A.R. 51-9-5 and K.S.A. 44-518 was not raised by respondent to the ALJ, and no hearing was conducted on that issue. The Board will not address that issue for the first time on appeal.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>11</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as

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<sup>8</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>9</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>10</sup> See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

<sup>11</sup> K.S.A. 44-534a.

permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>12</sup>

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of the Administrative Law Judge Bryce D. Benedict dated February 22, 2007, is hereby reversed as to the issue of authorization of gastric bypass surgery. Respondent's appeal of the issue of payment of temporary total disability benefits is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2007.

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BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant  
Patrick M. Salsbury, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge

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<sup>12</sup> K.S.A. 2006 Supp. 44-555c(k).